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SUPREME COURT OF THE UNITED STATES

No. _____

THOMAS J. EPPS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

TO CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE
UNITED STATES:

Your petitioner, Thomas J. Epps, Jr. hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on September 14, 1973 which affirmed the decision of the District Court.

OPINIONS BELOW

The Fourth Circuit Court of Appeals opinion decided on September 14, 1973 is appended hereto in the Appendix. The opinion of the Fourth Circuit has not been officially reported at this time.

JURISDICTION

The order sought to be reviewed was made and entered on September 14, 1973. No petition for a re-hearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Is an alleged consent search of a suspect made while he is in a custodial environment after he has requested the aid of an attorney, which has not been furnished to him, valid under the Fourth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons,

houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Amendment 4, Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was indicted on an indictment containing two counts. The first count charged him with robbery of the First Virginia Bank of Nansemond, Nansemond, Virginia, on the 29th day of December, 1972. The second count of the indictment charged the defendant with unlawfully and knowingly possessing about $500 which was taken and carried away with intent to steal and purloin from the care, custody, control and management and possession of the First Virginia Bank of Nansemond, Virginia, and that the defendant, Thomas James Epps, Jr., knew said money had been so taken and carried away.

The case was tried on March 27, 1973, in the District Court for the Eastern District of Virginia and the jury found the defendant not guilty on the first count of the indictment and guilty on the second count of the indictment. The defendant was sentenced by the Court to ten years in the Federal Penitentiary unless sooner discharged by those in authority. The Fourth Circuit Court of Appeals affirmed this decision (See App.).

[1]Reference will be made in the following manner (App. on Appeal) means the printed Appendix on appeal; (App.) means Appendix in Petition for Certiorari.

Prior to the trial of the case, defendant motioned the Court to suppress certain evidence, to-wit: United States currency taken from the defendant by agents of the Federal Bureau of Investigation on the grounds that it had been illegally seized from him. The motion to suppress the evidence was heard in the United States District Court on February 26, 1973 and the motion to suppress was overruled.

The facts regarding the seizure of the money are as follows: The bank was robbed of a large quantity of money on December 29, 1972, and on the same day the defendant, Thomas James Epps, Jr. was encountered by Special Agent John Bunszel of the Federal Bureau of Investigation in an area in Portsmouth, Virginia, known as Jeffry Wilson Homes (App. on appeal, p. 4).

Defendant was advised of his rights and was questioned for a short period of time at this site. He was given a waiver to sign regarding his rights which he read but declined to sign (App. on appeal, p. 5 and 6). At the time he was questioned in the Jeffry Wilson area, he was asked if he was involved in a bank robbery or knew anything about it and he denied it (App. on appeal, p. 10 and 11). At a later time, he was asked to accompany the Federal Bureau of Investigation to the Portsmouth, Virginia Police Headquarters for further questioning. The questioning took place in the office of the Chief of Detectives of the Portsmouth Police Department (App. on appeal p. 12 and 13). At the time of the questioning two agents of the Federal Bureau of Investigation were present along with two detectives from the Portsmouth Police Department (App. on appeal p. 13). The defendant came to

the police headquarters voluntarily and was not further advised of his rights (App. on appeal p. 14). The defendant was asked if he had any money in his possession and he indicated that he had $500 with him and he was asked if he would be willing to show this money to the officers (App. on appeal p. 14). He indicated that he would like to have the money put in an envelope and sealed with the amount written on it and then signed by the agents and himself subject to his seeing his attorney for advice (App. on appeal p. 15 and 16). Defendant indicated that he wanted his lawyer there before they took the money (App. on appeal p. 16).

He was then told that the agents only wanted to look at the money and at this point he produced the money and the agent recorded the serial numbers on the money and returned it to him (App. on appeal p. 22, 23, and 24). About two hours later the agents arrested the defendant and took the money from him (App. on appeal p. 24). There was no search warrant involved in this case (App. on appeal p. 25). Although there were three officers present at this time, the only officer to testify in regards to the seizure of the evidence and to the alleged consent by the defendant was Special Agent John Bunszel. The defendant, Thomas James Epps, Jr. testified in regards to the seizure of the money in question and stated that he was offered a waiver to sign regarding his rights to questioning. He refused to sign it without the presence of his counsel (App. on appeal p. 27). He then stated that the agent told him that he was going to ask him some routine questions, which he did (App. on appeal p. 27 and 28).

When he was invited down to the Portsmouth, Virginia police station, defendant asked the officers: "Before you ask me anything let me call my attorney first." (App. on appeal p. 30 and 31). He was told that he did not need his attorney because they were only going to ask him a few basic questions (App. on appeal p. 30). He was then asked if he had any money in his pocket and replied that he thought he had about $500 and $2 or $3 (App. on appeal p. 30). He was then asked if the agents could look at the money and he replied if my attorney says it's all right for you to look at it, you can look at it (App. on appeal p. 30). He said that the agent insisted on looking at the money and he told them that he would take the money and place it in an envelope and have all the parties sign the envelope and put it in a vault and it was to be opened only in his presence (App. on appeal p. 30 and 31). He stated the agents told him that they would be defeating their purpose and that they had other ways of getting the money and the best thing for him to do was to give them the money. He then relinquished the money (App. on appeal p. 31).

REASONS FOR GRANTING WRIT

The evidence should have been suppressed because it was not obtained under the authority of a search warrant and thus illegally seized. There was no valid consent to the seizure.

"It is well settled in the Fourth and Fourteenth Amendment that a search conducted without a search warrant issued

upon probable cause is 'per se unreasonable...subject only to a few specifically established and well delineated exceptions'. Katz v. United States, 389 U.S. 347, 357; 88 S.Ct. 503; Coolidge v. New Hampshire, 403 U.S. 443, 454, 455; 91 S.Ct. 2022; Chambers v. Maroney, 399 U.S. 42, 51; 90A S.Ct. 1975. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593; 66 S.Ct. 1256; Zap v. United States, 328 U.S. 624, 630; 66 S.Ct. 1277." Schneckloth v. Bustamonte, 92 S.Ct. 2041 (1973).

The sole question in this case was whether there was a voluntary surrender of the money in question to the F. B. I. agents.

In accord with the general principle permitting an individual to waive constitutional provisions intended for his benefit, constitutional right to be secure in person and effect against unreasonable search and seizure may be waived. A distinction is recognized between submission to apparent authority of an officer and unqualified consent. People v. Preston, 341 Ill. 407, 173 N.E. 383, 77 A.L.R. 631.

When an accused consents to a search, he relinquishes the 4th Amendment protection which prohibits unreasonable searches and seizures; implicit in the very nature of the term is the requirement of voluntariness, and to be voluntary the consent must be unequovical and specific and freely and intelligently given. United States v. Smith, 308 F.2d 57, 663 (2Cir 1962)

Cert. denied, 372 U.S. 90683 S.Ct. 717. The burden of proof is on the government to establish by clear and positive testimony that the accused's consent to a search of his premises was voluntarily given. State v. King, 44 N.J. 346, 209 A2d 110, 9 A.L.R.3d 847.

It is important to remember that the defendant was in a custodial environment at the Portsmouth Police Headquarters. A. p. 12. The defendant denied his guilt. A. p. 11. No sane man would actually be willing to have the police search his person for stolen money which is certain to be discerned. Certainly the defendant would not have consented to a search unless he felt because of his custodial environment that he must do so. It is undisputed that he asked that a lawyer be present before this was done. A. p. 15 and 16. A. p. 22.

The question involved here is not whether the defendant was advised of his constitutional rights under the Fourth Amendment, but rather was he deprived of his rights. Since consent to an otherwise illegal search involves a waiver of the right to be free from such searches the consent in question must meet the test of Constitutional waiver. United States v. Blalock, 255 F.Supp. 268 (Ed.Pa.1966). That is the waiver must meet two requirements. It must be (1) voluntary, and (2) intelligent. Judd v. United States, 89 U.S.App. D.C. 64, 190 F.2d 649 (1952).

When the defendant asked for an attorney, this indicated that he was insisting on his rights.

"...Consent to a search, in order to be voluntary must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred." Rosenblatt v. Henderson, 389 F.2d 514 (6C 1968). When the defendant asked for an attorney prior to the search, no effort should have been made to dissuade him from that right.

The burden of proving a valid waiver of the right to be free from unreasonable searches and seizures rests upon the government. Bumper v. N.C. 391 U.S. 543, 88 S.Ct. 178. Consent must be freely given to be effective. This means there must be a total absence of coercion, express or implied. Commonwealth v. Harris, 429 Pa. 215, 221; 239 A.2d 290 (1968). Mere acquiescence in the orders, suggestions or requests of the police can never be equated with consent. Judd v. U. S., Supra, Bumper v. N. C., Supra.

And in Schneckloth v. Bustamonte, Supra, the Court said in footnote number 29: "By the same token, the present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody."

In order to overcome the prima facie unconstitutionality of the search here involved the government relies

solely on the asserted consent of the defendant to the search; in other words, a waiver by the defendant of his Fourth Amendment rights. "However, rights given by the Constitution are too fundamental and too precious for waiver lightly to be found." U. S. v. Blalock, 255 F.Supp. 268 (Pa.).

Apart from the question of the voluntariness of consent as a fact question, the search violated defendant's rights under Miranda v. Arizona, 384 U.S. 436; 86 S.Ct. 1602. During his interrogation, he was asked if he had any money on him. He then asked for an attorney to advise him of his rights in this regard. Despite this, the agents by his own admission proceeded to procure from him a "consent" to search. The very purpose of the Miranda warnings are to permit a defendant to refuse further interrogation and allow the defendant to obtain legal advice as to his rights. The interrogating officer in any case, when the defendant so expresses himself and lodges such a request, should not continue interrogation nor seek further to procure consensual admission from him, whether in the form of confessions, consents to search, waiver of privileges or otherwise. Certainly this is a vital or critical step in his case, and having asked for counsel he was entitled to advice of counsel as to the consequences of what he was doing and as to what would be required to obtain a search warrant." U. S. v. Fisher, (U.S. D.C. Minn. 1971). It should be noted that the Fisher case is quite similar in its facts to the case at hand.

"The right to counsel, and the Miranda warnings informing the accused of this

right, while imposed to protect the 5th Amendment rights in Miranda is more pervasive. It is not linked solely to the protection of the Fifth Amendment rights but applies in every "critical" stage of proceedings. U. S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967). Certainly a request to produce evidence that is central to the prosecution's case is a critical stage of the proceedings against the accused. The presence of counsel is an effective check on the unknowing relinquishment of 4th Amendment rights just as it is an effective check on the unknowing waiver of 5th Amendment rights. Therefore, production of evidence by an accused without the assistance of counsel or without waiver of counsel, where, as in Miranda, the defendant is under arrest, cannot be construed a knowing or intelligent act." U. S. v. Pelensky, 30 F.Supp. 976, 978, 979, (D.Vt. 1969).

Schneckloth v. Bustamonte, Supra, supports the proposition that evidence obtained in a search pursuant to the consent of a person not in custody is not rendered inadmissible by the states failure to prove that the consenting person knew he had a Fourth Amendment right to withhold consent. It does not hold that a person who demands his rights, as in this case, is not entitled to them. The Court in Schneckloth said at page 2058: "In this case there is no evidence of any inherently coercive tactics -- either from the nature of the police questioning or the environment in which it took place. Indeed since consent searches will normally occur on a person's own familiar territory, the spectre of incommunicado police interrogation in some remote station house is inappropriate." And in the footnote the Court said, "...the present case

does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent."

It should be remembered in the case at hand that the defendant was in a custodial environment at police headquarters. Several F.B.I. agents were present as well as police officers. The pressure of police authority was upon him. A distinction should be drawn between submission to apparent authority of officers and unqualified consent. People v. Preston, Supra.

What possible use is the fact that the accused was told of his right to counsel, when the undisputed facts are that when he requested counsel his request was ignored? With the burden of proof resting heavily on the government, the fact that in face of the defendant's claim that he was told that it would be defeating the agents' purposes to call his attorney, the government only called one agent to testify while many agents and police officers were present at the time of the search. Surely there is doubt here that the defendant voluntarily and intelligently consented to the search.

CONCLUSION

Petitioner, after having been advised of his rights declined to sign a waiver but was interrogated by Federal Bureau of Investigation agents at police headquarters. He was asked to show the agents any money he had on his person and stated that he wanted to put the money in

a sealed envelope to be signed by all present only to be opened on the advice of his attorney. The only discrepancy in his testimony and that of the Federal Bureau of Investigation Agent was whether or not he was told he did not need an attorney. After he requested a lawyer he was further urged by the agents to show them the money and he allowed the agents to see the money and to record the serial numbers therefrom. There was no showing of probable cause for a search. Petitioner was searched without a search warrant and the facts show that he did not give a valid consent to the search. Thus the evidence taken should have been suppressed. Petitioner respectfully requests for the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lester E. Schlitz,
Of Counsel

LESTER E. SCHLITZ
Counsel for Petitioner
301 Central Building
Post Office Box 1137
Portsmouth, Virginia 23705

CERTIFICATE OF SERVICE

I hereby certify that three copies of the petition for a writ of certiorari in the case of Thomas J. Epps, Jr. v. United States were deposited in the United States mail, First Class prepaid, to Roger

Williams, Esq., United States Attorney, P. O. Box 60, Norfolk, Virginia 23501, Counsel for the United States of America, on the 1st day of October, 1973.

Lester E. Schlitz

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1535

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS JAMES EPPS, JR.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, Chief Judge.

Argued August 15, 1973
Decided September 14, 1973

Before WINTER, FIELD and WIDENER,
Circuit Judges.

Lester E. Schlitz, (Schlitz and Levy on brief) for Appellant; Roger T. Williams, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

PER CURIAM:

On the briefs and after oral argument, we find no reversible error.

A F F I R M E D.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS J. EPPS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-591

THOMAS J. EPPS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his surrender of stolen money during the course of station house questioning constituted an unreasonable search and seizure.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of an indictment charging him with unlawful and knowing possession of money stolen from a bank, in violation of 18 U.S.C. 2113(b).[1] He was sentenced to a term of ten years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

On December 29, 1972, agents of the Federal Bureau of Investigation encountered petitioner in the course of investigating a bank robbery that had taken

[1] He was acquitted on a count charging bank robbery, in violation of 18 U.S.C. 2113(a) and (d).

place earlier that day (Tr. 57).[2] Identifying themelves, they expressed a desire to discuss the robbery with him. They gave petitioner a form setting forth the *Miranda* warnings and read them to him (Tr. 58-59). Petitioner indicated that he understood his rights, but declined to sign the waiver form (Tr. 59, 61).[3] He then denied any knowledge of the bank robbery (Tr. 63-64).

The agents asked permission to search the car in petitioner's possession, and petitioner agreed. Once it was discovered that the car was not registered to him, the agents stated that they wanted the consent of its owner before proceeding (Tr. 63-64). Followed by the officers, petitioner drove to the home of the owner, where consent to search was obtained. The search did not uncover any evidence (Tr. 64-65).

Although he was not under arrest, petitioner agreed to drive to police headquarters, stating that "he wanted to get the matter straightened out" (Tr. 66). At the police station, the agents asked petitioner whether he had any money with him, and he replied that he had five hundred dollars. The agents then asked to see the money. Petitioner, apparently concerned about the return of the money, "indicated that he—he would like to have the money put into an envelope and sealed, with the amount written on it, and then signed by the agents and himself, and to have it opened in the presence of his attorney" (Tr. 67-68). Agent Bunszel testified further

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[2] "Tr." refers to the transcript of the proceeding held on February 26, 1973.

[3] Petitioner claims that at this time he requested counsel (Tr. 81). Agent Bunszel testified, however, that no such request was made until petitioner was asked to produce for inspection the money in his possession at the police station (Tr. 62). The trial court expressly rejected petitioner's contention in this regard (Tr. 96).

that, "in talking with him a moment further it was obvious that he was under the impression that we planned to keep the money, and as soon as it was clear to him that we only wanted to look at it he was perfectly agreeable to showing it to us" (Tr. 68). After recording the serial numbers of the bills, the agents returned the money. Two hours later petitioner was placed under arrest and the money was confiscated (Tr. 76-77).

The record establishes that petitioner's initial reluctance to produce the money rested entirely on the fear that it would not be returned in full. In fact, petitioner never refused to produce it; he simply requested that certain conditions be met—including the presence of counsel—to ensure its safety before he relinquished possession. Once assured of prompt return, however, petitioner dropped his request and agreed to give up the money, stating that he had "no objections" to showing the officers the money in order "to clear himself" (Tr. 70). With regard to the issue of presence of counsel, the trial court observed that "[a]t no time did [petitioner] indicate that he wanted a counsel unless the agents were then going to take his money away from him, and if they were going to deprive him of his money then he did wish it placed in an envelope," that envelope to be signed, sealed, and then opened in the presence of his attorney (Tr. 96-97).[4] The court concluded that "when it was made clear to him that [the agents] did not intend to take his money from him at that time he freely and voluntarily furnished them with the money" (Tr. 97). There is no reason for further review of this basically factual finding.

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[4] We note further that the failure to sign a waiver does not impair the voluntariness of a consent, if it is shown that the suspect was properly informed of his rights and freely and voluntarily consented. *United States* v. *Thompson*, 417 F. 2d 196 (C.A. 4).

Petitioner claims further that the consent he gave at the police station was the result of "submission to apparent authority of an officer" (Pet. 7). This, however, is not a case like *Bumper* v. *North Carolina,* 391 U.S. 543, where officers misstated their authority in order to gain entry to private premises. Here as the trial court stated "beyond any question * * * before any questioning of the defendant was conducted the defendant was fully advised of and understood his constitutional rights" (Tr. 96). The court noted further that petitioner "agreed to accompany [the agents] to the police station and there to continue to answer questions" (Tr. 96). At the police station, petitioner was free to leave at any time prior to his arrest. Petitioner does not allege that any attempt was made to restrain his movements. In short, the record is completely free of any hint of deceit, duress, or coercion, express or implied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12